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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 459

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK

Petitioner,

v.

FEDERAL POWER COMMISSION *et al.*

Respondents.

No. 473

THE UNITED GAS IMPROVEMENT COMPANY

Petitioner,

v.

PHILADELPHIA ELECTRIC COMPANY,

Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent,

PAN AMERICAN PETROLEUM CORPORATION, ATLANTIC REFINING COMPANY, CITIES SERVICE PRODUCTION COMPANY, HUMBLE OIL & REFINING COMPANY, OHIO OIL COMPANY, OIL PARTICIPATIONS INCORPORATED, TIDEWATER OIL COMPANY, TRANSCONTINENTAL GAS PIPE LINE CORPORATION, CONTINENTAL OIL COMPANY, MAGNOLIA PETROLEUM COMPANY, PURE OIL COMPANY, SUN OIL COMPANY, UNION OIL COMPANY OF CALIFORNIA, W. H. HUNT, Trustee for Hassie Hunt Trust, PHILLIPS PETROLEUM COMPANY,

Intervenor Respondents.

MOTION OF PUBLIC SERVICE ELECTRIC AND GAS COMPANY FOR LEAVE TO FILE A BRIEF, *AMICUS CURIAE* IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI, AND BRIEF, *AMICUS CURIAE*.

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Intervenor-Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE.*

MAY IT PLEASE THE COURT:

The undersigned, as counsel for Public Service Electric and Gas Company, respectfully moves this Honorable Court

for leave to file the accompanying brief in the above-entitled cases as *Amicus Curiae*, pursuant to Rule 42 of the Revised Rules of the Supreme Court. The consent of the parties in legal interest in the record was requested by letter mailed October 14, 1959. The consents of the Public Service Commission of the State of New York, The United Gas Improvement Company, Philadelphia Electric Company and Union Oil Company of California have been obtained. The Ohio Oil Company, The Pure Oil Company, Pan American Petroleum Corporation, Cities Service Production Company, The Atlantic Refining Company, Continental Oil Company, Hassie Hunt Trust and Socony Mobil Oil Company (successor to Magnolia Petroleum Company), have refused to accord their consent. Up to the time of printing no response has been received from the Solicitor General of the United States, the Federal Power Commission, Respondent, or the remaining intervenor-respondents.

Public Service Electric and Gas Company is a purchaser of large volumes of natural gas from three transmission pipe line corporations. It participated as a party in the hearings before the Federal Power Commission in the matters of *Transcontinental Gas Pipe Line Corporation, Docket Nos. G-13,143, et al.*, 20 F. P. C. 264 (25 PUR 3d 157), which proceedings, commonly referred to as the Transco-Seaboard case, are the subject matter of the instant petitions. Public Service Electric and Gas Company was one of the successful parties in *Atlantic Refining Company, et al.* v. *Public Service Commission of the State of New York, et al.*, 360 US 378, commonly referred to as the CATCO case. It is the position of Public Service Electric and Gas Company that there is a direct conflict between the decision in the matter at issue (Transco-Seaboard) and the decision of this Court in the CATCO case. These cases involve the propriety of certain orders of the Federal Power Commission

pertaining to the issue of initial prices in natural gas producers' certificate proceedings. Public Service Electric and Gas Company is vitally interested in and concerned with the field price of gas since it and its customers are directly affected by any increase in this element of the cost of gas. The failure of the Commission to condition the granting of the certificates under Section 7 of the Natural Gas Act forecloses the possibility of refunds to Movant's customers in the event the initial prices are subsequently found to be unjust and unreasonable. Refunds of this character to Public Service Electric and Gas Company are passed on to its customers by the operation of the Raw Materials Adjustment Clause incorporated in its Tariffs for Gas Service filed with the Board of Public Utility Commissioners of the State of New Jersey. This failure to protect the consumer is contrary to the intent of Congress which is to protect consumers from exploitation at the hands of natural gas companies. This policy was clearly enunciated by this Court in *F. P. C. v. Hope Natural Gas Company*, 320 US 591 (1944) and in *Phillips Petroleum Company v. Wisconsin*, 347 US 672 (1954).

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and Gas Company.

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BRIEF OF PUBLIC SERVICE ELECTRIC AND GAS COMPANY, *AMICUS CURIAE*, IN SUPPORT OF THE PETITIONS FOR WRIT OF CERTIORARI.

Interest of *Amicus Curiae*.

This brief is submitted on behalf of Public Service Electric and Gas Company, a public utility operating company

engaged in the manufacture and distribution of electricity and gas. It was organized July 25, 1924 under the laws of the State of New Jersey and has its principal and executive offices at 80 Park Place, Newark 1, New Jersey. It is authorized to do and does business only in the State of New Jersey. It serves gas to over 1,100,000 customers in an area having a population of more than 3,400,000 persons and which extends from the Hudson River opposite New York City to the Delaware River at Trenton and thence to a point south of Camden at Woodbury, New Jersey.

Public Service Electric and Gas Company is the largest contract customer of Transcontinental Gas Pipe Line Corporation and is presently authorized to purchase 169,000 Mcf of natural gas per day. Additionally, it purchases 119,000 Mcf per day from Texas Eastern Transmission Corporation and 25,000 Mcf per day from Tennessee Gas Transmission Company. These purchases are made under 20-year contracts.

Public Service Electric and Gas Company had participated fully before the Federal Power Commission and the courts, up to and including argument before this Court in *Atlantic Refining Company, et al.*, v. *Public Service Commission of the State of New York, et al.*, 360 US 378. This Court's opinion in that case, issued June 22, 1959, was generally considered to be a most significant ruling interpreting the Natural Gas Act with respect to the intent of Congress to protect the consumer of natural gas. Less than a month and a half later, on August 4, 1959, the United States Court of Appeals for the Third Circuit in the instant case, by a vote of two to one, affirmed the action of the Commission in issuing certificates of public convenience and necessity without condition where the facts and circumstances were substantially identical with those in the CATCO case. It is the position of Public Service Electric

and Gas Company that there is a direct conflict between the decision in the instant case and the decision of this Court in the CATCO case. Public Service Electric and Gas Company contends that if the decision of the Circuit Court of Appeals in this case is permitted to stand it will have the effect for all practical purposes of overruling the decision of this Court in the CATCO case. This is evident from an examination of certain orders of the Federal Power Commission adopted since August 4, 1959. In these orders the Commission, while referring to the CATCO case, has disregarded the strictures contained in the opinion of this Court therein and has issued certificates involving initial prices in excess of the CATCO price, relying on the decision by the Circuit Court of Appeals in the Transco-Seaboard case. *In the matters of Superior Oil Company, et al.*, Docket No. G-16,380, *Sun Oil Company, et al.*, Docket No. G-15,122, *et al.*, *Sunray Mid-Continent Oil Company*, Docket No. G-14,753, and *The California Company, et al.*, Docket No. G-16,108.

Public Service Electric and Gas Company believes that it represents the ultimate consumers—that is, its customers—and, because of the importance of the initial price issue herein and the frequency with which it will arise, the public interest requires a definitive ruling by this Court.

ARGUMENT:

Affirmance by the United States Court of Appeals for the Third Circuit of the Commission's order which failed to provide for the protection of consumers by appropriate use of its conditioning authority with respect to initial prices in producer certificate proceedings contravenes the principal purpose of the Natural Gas Act and is in conflict with this Court's CATCO decision.

The decision below, issued August 4, 1959, is in conflict with this Court's CATCO decision, issued June 22, 1959, and the policy of the Natural Gas Act. It overlooks the fact that the purpose of the Act was to "* * * underwrite just and reasonable rates to the consumers of natural gas.", *Atlantic Refining Company, et al.* v. *Public Service Commission of the State of New York, et al.*, 360 U. S. 378. As this Court said at page 388:

> "* * * The Act was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges. The heart of the Act is found in those provisions requiring initially that any 'proposed service, sale, operation, construction, extension, or acquisition . . . will be required by the present or future public convenience and necessity,' §7(e), 15 U. S. C. §717 f(e), and that all rates and charges 'made, demanded or received' shall be 'just and reasonable,' §4, 15 U. S. C. §717(c). * * *"

Further, at page 389, this Court said:

> "* * * The overriding intent of the Congress to give full protective coverage to the consumer as to price is further emphasized in §5 of the Act, 15

U. S. C. §717d, which authorizes the Commission *sua sponte*, or otherwise, to institute an investigation into existing rates and charges and to fix them at a just and reasonable level. Under this section, however, the rate found by the Commission to be just and reasonable becomes effective prospectively only. Gas purchasers, therefore, have no protection from excessive charges collected during the pendency of a §5 proceeding.

"In view of this framework in which the Commission is authorized and directed to act, the initial certificating of a proposal under §7 (e) of the Act as being required by the public convenience and necessity becomes crucial. This is true because the delay incident to determination in §5 proceedings through which initial certificated rates are reviewable appears nigh interminable. • • •"

The decision below does not afford consumers the complete, permanent and effective bond of protection from excessive rates and charges which Congress intended for them. Instead the Commission has granted permanent certificates without any price condition even though the initial prices are higher than the CATCO prices. The only remedy left to consumers is the right to apply for a Section 5 proceeding, which this Court has said in CATCO affords no protection from excessive charges collected during the pendency of the proceeding. P. 392.

If the Commisssion were to use its clearly established power to condition certificates with respect to initial prices to provide for refunds if found to be appropriate, the overriding intent of Congress to give full protective coverage, pricewise, to the consumer would be realized.' However, the failure of the Commission to exercise its power, as here, where the initial price, in excess of the CATCO price, signals the existence of a situation not in the public interest,

precludes the possibility of any refund to the consumers. The extent of the liability of the consumer to pay charges which later may be found to be excessive without any chance of recovering the excess cannot be accurately measured, but some idea of its magnitude can be seen from the fact that Transcontinental, the purchasing pipe line, subsequent to the issuance of the Commission's September 4, 1958 order, filed for an increase in its rates of 3.97¢ per Mcf on May 18, 1959 in Docket No. G-18, 783. The period of time the consumer will have to pay possible excessive charges is likewise indefinite, but we do know that the Section 5 proceedings in *Phillips Petroleum Company* v. *Wisconsin*, 347 US 672, have not been concluded despite the fact that the jurisdictional issue was decided by this Court on June 7, 1954. No other producer Section 5 case has as yet been decided. It is abundantly clear as this Court has stated in the CATCO case at page 390 that Congress did not intend that the producers should be provided with a windfall over a long period of time during which the consumer would not even have the protection of a refund possibility. The payment of rates subject to refund is itself a hardship, but the finality of payment with no hope of redress, never so intended by Congress, is intolerable. Public Service Electric and Gas Company, like other gas distribution companies on the Eastern Seaboard, has provisions in its filed tariff, the operation of which results in the automatic reimbursement to its customers of the full amount of any such refund.

The Court below arrived at a result contrary to that determined by this Court in the CATCO case because it decided that the initial price was not "out of line", that there was a "need" for the gas and that natural gas is less expensive than manufactured gas. These reasons, relied upon to distinguish the instant case from CATCO,

represent what might be called a "difference without a distinction". The initial price here, slightly in excess of the CATCO price, is based on and was the direct result of the CATCO price, which price itself has been remanded by this Court for further consideration by the Commission. The other two reasons, in fact, were present in the CATCO case to the same extent as in these proceedings. The three so-called distinguishing reasons advanced by the Court below, in no way relieve the Commission of its duty to so administer the Act, as to protect consumers against exploitation at the hands of natural gas companies, by providing for refunds or other equally effective safeguards, until the reasonableness of the initial prices may be established.

Public Service Electric and Gas Company respectfully urges this Court to grant a Writ of Certiorari herein because of the great public interest involved. The interpretation of the Court below of the purport and intent of this Court's CATCO decision if allowed to stand will cause the Federal Power Commission to continue to disregard the CATCO case and rely on the affirmance by the Court below of the Commission's order which was issued prior to the CATCO decision. If certiorari is not granted the practical effect will be to nullify the protection which we think this Court intended to insure consumers of natural gas by its decision in the CATCO case.

The result reached by the two-to-one decision of the Court below is so patently in direct conflict with the result reached by this Court, without dissent, in the CATCO case, as to require review by this Court in order to insure consumers a complete, permanent and effective bond of protection from excessive rates and charges.

Conclusion.

It is respectfully submitted that the Petitions for a Writ of Certiorari should be granted.

Respectfully submitted,

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Electric and Gas Company.

WILLIAM H. BLAKE,
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Of Counsel.

October 23, 1959.

Certificate of Service.

I, EDWARD S. KIRBY, attorney for *amicus curiae*, and a member of the bar of the Supreme Court of the United States, do hereby certify that I have served upon the Solicitor General of the United States and counsel of record for each other party a copy of the foregoing brief *amicus curiae*, in support of the petitions for a writ of certiorari to the United States Court of Appeals for the Third Circuit by depositing true and correct copies thereof in the United States mail, first class or air mail, where appropriate, postage prepaid, on October 23, 1959, addressed as follows:

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